an arbitrator at the meeting of the biennial delegates conference held on September 25 and 26, 1971, he was then a member of the Executive Council. In the absence of such evidence, it is reasonable to infer that at the time of his appointment he was not a member of the Executive Council, and as such I rule that he is not disqualified. As regards Mr. A. Sivanathan, although he is a member of the Selangor Branch, the fact that the validity of the relevant resolution in this case affects the entire members of the Union, I do not think that he should be disqualified. It would be different if the dispute was confined between the Selangor Branch and the main body of the Union or the Executive Council. If the argument of applicants' counsel is upheld, it would mean that none of the arbitrators would be qualified to be arbitrators. Under the circumstances, it is my considered opinion that there is in existence a panel of arbitrators appointed pursuant to sub-rule (2) of rule 26 which is ready and available to determine the dispute which has arisen in this case. Accordingly, I uphold the first preliminary objection.

On the second preliminary objection that this action should have been commenced by writ and not by Originating Summons, I take into consideration the fact that the present case involves the determination of serious questions of facts. For instance, it has to be decided as an issue of fact whether by postponing the biennial delegates conference beyond September 30, 1973 and fixing it on December 15 and 16, 1973 the respondents in fact intended not to have a biennial delegates conference this year but intended to have an extraordinary delegates conference instead pursuant to rule 10(6) of the Union's Constitution having regard to annexure "NUCW 4". Secondly, it is also to be decided whether the respondents have no reasonable cause for not having the biennial delegates conference by the date specified in rule 9 as envisaged by rule 10(6). Since these facts cannot be determined on the affidavits filed, I am of the view that they can only be resolved by examination of witnesses. Having regard to the facts in issue, I do not think this case comes within the ambit of Order 55 Rule 3 of the Rules of the Supreme Court, which is generally intended for simple matters. (See judgment of Chang Min Tat J. in *Abdul Majid* v. *Haji Abdul Razak*[4]). It is true that the Rules of the Supreme Court 1957 do not list out the mode of commencement of action; and that with the exceptions of certain action which must be commenced by certain modes, the Rules of the Supreme Court are lax. Learned counsel for the applicants has referred to Order 28 Rule 7 of the English Rules of the Supreme Court (White Book 1966) which reads:

"(1) Where, in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

(2) Where the court decides to make such an order, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings and that order were one of the orders to be made thereon.

(3) This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.

(4) Any reference in these rules to an action begun by writ shall, unless the context requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this rule to continue as if the cause or matter had been so begun."

That is absent in our Rules of the Supreme Court, but Mr. Wong submits that by virtue of our Order 72 Rule 2 that English rule is applicable here. With due respect, Order 72 Rule 2 refers to practice and procedure when the English Rules of the Supreme Court were adopted here, *i.e.* 1957 Rules of the Supreme Court. Under the circumstances, Order 28 Rule 7 of the new English Rules of the Supreme Court is not available in this country. I would therefore uphold the respondents' objection on the second ground.

As regards the third preliminary objection, I do not think that the failure to join the Union as a party is fatal to the present application. Although strictly speaking, the capacity of the various respondents ought to have been stated in the title, this matter has been covered in the joint affidavit of the applicants. In any event, such irregularity can always be cured by necessary amendments.

Since the first two preliminary objections have been upheld, I dismiss the application with costs.

Application dismissed.

Solicitors: *Mah-Kok & Din; Xavier & Vadiveloo.*

SHEIKH ABDULLAH BIN SHEIKH MOHAMED v. KANG KOCK SENG & ORS.

[O.C.J. (Syed Othman J.) November 30, 1973]
[Kuantan — Civil Suit No. 51 of 1970]

Practice and Procedure — Interrogatories delivered after close of pleadings — Trial commenced — Exceptional circumstances to be shown.

In an application for leave to serve interrogatories on the defendants after close of pleadings and after commencement of the trial exceptional circumstances must be shown. These circumstances must be of such a nature that the applicant could not have foreseen them after the exercise of due diligence.

Case referred to:-

(1) *Ellis* v. *Ambler* 36 T.L.R. 410.

CIVIL SUIT.

N. T. Rajah (*Balendran* with him) for the plaintiff.

P. Mooney (*C. Paramjothy* with him) for the defendants.

Syed Othman J.: In the action connected with this application the plaintiff alleges that on 6th January, 1970 the first defendant, banker and financier of the fifth defendant company, defrauded him into executing a power of attorney to deal with his interest in the company, an agreement selling and assigning absolutely

all his 100 shares (of $10 each fully paid up) in the company to the first defendant, and a letter of resignation from the board of directors. The other directors are the second, third and fourth defendants. He also pleads *non est factum.*

The defence of the first defendant is that the plaintiff made a voluntary sale of his entire shareholdings in the company for $40,000. The defence of the other defendants is in effect that the company had been inactive since its incorporation and that they were not parties to the fraud.

When the action first came up for trial it did not proceed as smoothly as one would expect. One witness for the plaintiff was said to be in Australia, and another, who should have been called, had not been subpoenaed. Counsel for the plaintiff informed the court that he would get evidence *de bene esse* from the witness in Australia and would call the proper officer from the Rompin Mines Ltd. to give evidence on some documents and connected matters. The case was postponed to a date to be fixed. Since in the case counsel from outside Kuantan were involved, it was understood that parties would supply the court with their dates for continued hearing. No dates were supplied.

The plaintiff in the meanwhile applies for leave to serve on the first defendant interrogatories. The defendants' side objects to these interrogatories on many grounds, mainly, that they are delivered after the pleadings have closed and in the midst of trial the plaintiff having given evidence, the trial has been postponed at the instance of the plaintiff in order to enable him to call some witnesses, and since the allegation in the action is fraud the onus of proof is on the plaintiff and the first defendant is not bound to answer questions which may tend to incriminate him.

From the pleadings in this action, as far as I can see the main question in issue is the circumstances leading to the plaintiff executing the power of attorney, the agreement and the letter of resignation. None of the questions relate to this main question in issue. I am not informed what is the connection between the answers to these interrogatories and the main question in issue and their real purpose.

Question 1 enquires whether the first defendant had been the financier of the plaintiff and the other defendants since 1965. The other 5 questions are about a transaction between the company and a mining company in 1969, some related matters and payments alleged to have been made by the mining company to the first defendant sometime in January, 1970. From the plaintiff's own statement of claim he was in the company till about January, 1970 and question 1 itself suggests that the first defendant had also been financing him. All these matters should therefore be within the knowledge of the plaintiff. On this very consideration I cannot see that the particulars required are necessary at all.

Further, in the action the plaintiff is charging fraud. It is therefore a matter for the plaintiff to prove the particulars of fraud set out in his statement of claim and not for any of the defendants to supply him with those particulars. To the objection that the questions may incriminate the defendants, the solicitor for the plaintiff merely says that it is necessary to the plaintiff's case that he should get definite answers from the first defendant to the questions, particularly those relating to the transaction with the mining company. From this it is clear that the plaintiff is fishing for evidence as to whether or not the defendants made a vast sum of money out of the transaction with the mining company. In any case, the plaintiff should be able to show the amount involved in the transaction, since an undertaking has been given that the proper officer of the mining company would give evidence on the transaction.

The solicitor then mentions that the plaintiff is somewhat apprehensive of the evidence that may be given by the officer of the mining company. I fail to understand this as the defence side has told me that the officer who would be in a position to give the necessary evidence is none other than Mr. A. J. Taylor, a former judge of the High Court in this country, and who is now the legal officer of the mining company. I would disallow the questions on this very ground, apart from the fact that it has not been shown that the questions would not incriminate the defendants.

In addition to all the above, on the authority of *Ellis* v. *Ambler,*[1] I do not have to consider the application at all, as the plaintiff has given no reason for presenting the interrogatories after the pleadings have closed. In that case, the plaintiff applied for leave to deliver interrogatories after having closed the pleadings. He gave no reason for the delay. The judge refused leave without even looking at the interrogatories. On appeal, the court refused to interfere with the discretion of the judge in Chambers. The case is on all fours with the present case. In fact the present case goes further against the plaintiff. He had all the opportunities to deliver the interrogatories much earlier as the statement of claim was amended twice. The solicitor while preparing the amendments should have realised whether or not the interrogatories would be necessary. The solicitor appearing on behalf of the plaintiff now says it was his fault. Whether or not it was his fault does not answer the question whether the questions are necessary at all, and does not make the circumstances exceptional for the court to exercise its discretion in granting leave. Ordinarily in an application for leave to deliver interrogatories after the pleadings have closed exceptional circumstances must be shown: see *Atkins* Court Forms 2nd ed. Vol. 22, page 367. To my mind the circumstances to be shown must be of such a nature that the applicant could not have foreseen after the exercise of due diligence. None has been shown here.

On any consideration I can see no ground for granting this application. It is dismissed with costs.

Application dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Wong & Paramjothy.*